IN THE MISSOURI SUPREME COURT

Case No. SC86302

ST. CHARLES COUNTY, et al.,

Appellants,

v.

CITY OF ST. PETERS, et al.,

Respondents,

and

ATTORNEY GENERAL JAY NIXON,

Respondent/Intervenor.

On Appeal from the Circuit Court of St. Charles County
Honorable Lucy D. Rauch

BRIEF OF AMICUS CURIAE GREAT RIVERS HABITAT ALLIANCE

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Great Rivers Habitat Alliance

The Great Rivers Habitat Alliance (Great Rivers) is a Missouri not-for-profit corporation representing the interests of its members. Great Rivers is committed to furthering the interest that all Missourians share in the environment and the wildlife habitat in and around the Missouri and Mississippi Rivers.

Great Rivers' interest in this matter stems from other TIF redevelopment plans of cities, including St. Peters (known as the 370 TIF) that propose to develop flood plain and wildlife areas within city limits which will have potentially enormous adverse ramifications for its members, city residents and wildlife in and along the Mississippi River Valley. Great Rivers believes that cities are attempting in other TIF's, such as the 370 TIF, to do what it has done in the TIF which is the subject of this appeal, i.e., improperly use tax increment financing as an incentive to spur new development to, and tax revenues for, the city, as opposed to the proper use of the urban renewal tool to correct existing conditions of blight. The City of St. Peters has, and continues to, aggressively use tax increment financing for the purpose of developing property to grant, sell or lease land to private developers in and around St. Peters. St. Peters' continued actions in taking private property and granting it to private developers without a public purpose nor for a public use has continued at an ever greater scale and shows no sign of abating. Issues presented in this case have substantial relationship to the issues present in other TIF projects, including the 370 TIF, being opposed by Great Rivers and could affect the organization's success or failure in its efforts to stop the improper actions of

other cities and the City of St. Peters on the 370 TIF. Great Rivers has an interest in preserving wildlife habitat, including that within and bordering the City of St. Peters. No other party to this matter has an interest in preserving and protecting wildlife habitat from the ever ongoing encroachment of the City of St. Peters (and other entities) through the improper use of governmental powers and tax dollars.

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Amicus Curiae, Great Rivers Habitat Alliance, adopts the Statement of Facts presented by St. Charles County, Appellants herein.

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Annbar Associates v. West Side Redevelopment Corporation, 397 S.W.2d 635 (Mo. banc 1965)

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ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF ST. PETERS AND IN DENYING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS BECAUSE THE ST. PETERS BOARD OF ALDERMEN ACTED ARBITRARILY AND CAPRICIOUSLY OR IN EXCESS OF ITS AUTHORITY IN DETERMINING THAT THE ST. PETERS CENTRE REDEVELOPMENT AREA WAS BLIGHTED IN THAT THE AREA DID NOT CONTAIN A PREPONDERANCE OF LAND THAT WAS BLIGHTED.

Introduction

The City of St. Peters' actions in establishing Tax Increment Financing (TIF) for the St. Peters Centre Redevelopment Area presents two open and obvious issues for this Court to address to protect Missouri taxpayers, political subdivisions, and Missouri lands and property owners from abuse under the TIF scheme. First, the blight determinations made by the City of St. Peters, if sustained, would ultimately allow any and all land to be blighted at the merest whim of a City Council for no better purpose than to raise money for the City's coffers or give away the tax dollars of the city, local school districts and other local taxing entities and the property of others to developers. St. Peters' determination that the St. Peters Centre Redevelopment Area was a blighted area was arbitrary and capricious and without substantial factual support. The so-called blighting

factors referenced by the City make a mockery of the initial purpose and the legislative intent of the TIF statutes found in Chapter 99.[1] The Court should not allow the City to bootstrap the forced development of 581 acres of land from minor and isolated instances of conditions which are mere inconveniences to development. For this reason, the St. Peters Centre Redevelopment Project should be overturned and the decision of the Circuit Court should be reversed.

Secondly, this appeal gives the Court the opportunity to address the permissible scope of the Tax Increment Financing Act, particularly its improper use of tax dollars for the primary benefit of private developers. As noted above, this case presents an issue which will allow the Court to establish whether urban renewal legislation, such as the TIF Act, was intended to be a reactive device to cure recognized social ills of blighting or whether it is to be used a pro-active panacea in the ever-increasing competition between cities to attract new development to the city. Across the nation, other states' courts have expressed their concern with the increasing misuse of tax increment financing and other urban renewal programs, dealing both with the use of taxpayer funds and governmental powers. These courts have determined that local governments have gotten out of control in their use of tax increment financing and the coercive power of eminent domain that typically accompanies the use of TIF. The courts of several states have reined in the use

[1] Section 99.800, et seq. is titled the Real Property Tax Increment Allocation Redevelopment Act but is more widely been known as the Tax Increment Financing (TIF) Act.

of governmental powers and public dollars for private developers as this Court should also do. Even the United States Supreme Court is now determining whether powers of a city may be used to take land for the benefit of a private developer. This Court should take this case as an opportunity to rein in the abuses under the TIF Act and insure that it once again is only used for important urban blight redevelopment purposes and not as a bidding tool for every Wal-Mart or Costco that comes down the street.

A.

A Preponderance of the Redevelopment Area Is Not Blighted

The Tax Increment Financing Act, contained at Section 99.800, et seq., defines "blighted area" as:

> "Blighted area," an area which, by reason of the **predominance** of defective or inadequate street layout, unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire or other causes, or any combination of such factors, retards the provision of the housing accommodations or constitutes economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use.

Section 99.805(1), RSMo, Cumm. Supp. 2004. (Emphasis supplied). As can be seen from the definition established by the General Assembly, there must be a **predominance** of these blighting factors, and not just the existence or occurrence of examples of the enumerated blighting factors.

In the current matter, the City of St. Peters has ignored the requirement of "predominance" and has instead accepted its consultants' rote characterizations, which in a more objective consideration of the facts would be properly viewed as an attempt to bootstrap blight for a whole area from minor and isolated conditions that have affect only very small parts of that area.[2] A review of the Redevelopment Plan (Plaintiff's Exhibit No. 1) clearly reflects that there is no "predominance" of any blighting factors.

The St. Peters Centre Redevelopment Area represents approximately 581 acres of land in the City of St. Peters. Exhibit 1, page 4. The St. Peters Centre Redevelopment Area is bordered by Mexico Road on the South and Interstate 70 on the North and lies immediately to the East of (and adjoining to) the Mid-Rivers Mall in the City of St. Peters. *Id. and Appendix, page A-9.* The land making up the St. Peters Centre Redevelopment Area is arguably some of the most valuable land in the entire St. Louis Metropolitan Area and certainly within St. Charles County. It lies near the major intersection of State Route 370 and Interstate 70, major traffic routes in the West St. Louis Metropolitan Area. *Id.* Furthermore, it is located next to a very fast developing retail area based along Mid-Rivers Drive and Interstate 70, which is immediately to the West of the proposed Redevelopment Area. *Id.* To find such land to be blighted surely

[2] The conditions noted as the "blight" that is eating away at the area included within the TIF area may more properly be termed minor inconveniences to new development of the 581 acre tract involved. For purposes of this discussion, those factors noted in the redevelopment plan will be considered as blighting in effect.

makes a mockery of the original intent of urban redevelopment and has no impact on the urban blight that the TIF Act was intended to address.

For example, the determination that there is inadequate street layout is based on the fact that there have been four accidents at a single intersection in a twelve month period. Plaintiff's Exhibit 1, p. 9. St. Peters, it should be noted, is one of the fastest growing communities in the State of Missouri.[3] Identifying only four accidents in a year at a single intersection to be support for a finding of inadequate street layout for a 581 acre tract of property is absolutely arbitrary and capricious, as it is ridiculous. On that basis, nearly any intersection in any city would be the basis for a determination of blight, not only for that intersection but potentially for miles around as well. Ultimately, four accidents does not support any type of inadequate street layout.

Similarly, to suggest that inadequate street layout exists because an undeveloped parcel lacks streets shows an absence of objective consideration of whether the TIF statutory factors exist. Vacant previously undeveloped land of substantial size, is by definition not going to have streets upon it. To use this fact to support blight calls into question every parcel of land that is not developed. Such a finding is arbitrary and capricious. It also illustrates the extent to which the TIF statute can be abused to subsidize the profits of developers of <u>new</u> development at the expense of local school

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[3] St. Peters' population has grown from 15,700 in 1980 to 40,660 in 1990 and 51,381 in 2000. <u>Official Manual</u>, 1999-2000, p. 823 and <u>Official Manual</u>, 2001-2002, p. 906.

districts and other local taxing districts who see their tax revenues siphoned off to pay for those streets as reimbursable project costs. Under such a view of inadequate street layout, developers who would normally be required under existing city codes to both build the streets at their cost and dedicate them to the city would be able to successfully shift the cost of that construction item to the schools and other taxing districts.

The same applies to findings of deterioration of site improvements, obsolete platting[4] and the other minor conditions noted by the City. For example, the City uses buildings acquired by the Department of Transportation for clearance to find "excessive vacancies." Exhibit 1, p. 15. By taking isolated examples, the City has sought to manufacture blight, not where blight exists, but where it wishes to have development and in result have increased tax revenues to the City. Such contempt for the purposes of the TIF Act must be controlled by this Court.

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[4] As with the inadequate street design argument advanced by the City, the condition of obsolete platting shines a bright spotlight on the fundamental issue of whether tax increment financing is intended to be reactive or pro-active in nature, i.e., is it intended to ease the efforts of developers of new development in their assembly of parcels for a particular large parcel development under consideration or is it meant to address those circumstances in which platting is based on archaic concepts of development and it is the platting itself which is the root cause of an absence of development occurring on the property?

The arbitrary nature of the City of St. Peters' decision conflicts with the statutory procedure and intent of Section 99.810.1 which requires proper findings reflecting that the area is truly a "blighted area." Section 99.810.1(1), RSMo, Cumm. Supp. 2004. The analysis must be that the Redevelopment Area "on the whole is a blighted area," not that there are individual examples of blight found at certain spots within the Redevelopment Area.

Compliance with the statutory requirement that there must be a predominance of blighting factors in the TIF area to be redeveloped as a means of reacting to the social ills produced by blighting that actually exist is rooted in the state's Constitution and has found expression in the statements on the courts of the state dealing with the various programs available for dealing with blight. Urban renewal, the basis for the Tax Increment Financing Act, §§99.800, *et seq*., was given constitutional recognition and authorization in Missouri in the 1945 constitution, MO. CONST. ART. VI, §21 & ART. X, § 7, and has been a part of the toolbox available to deal with the problem of urban blight for over 60 years. *Annbar Associates v. West Side Redevelopment Corp*., 397 S.W.2d 635, 640 (Mo. banc 1965)("Such constitutional authority as is needed for full and complete elimination of this cancerous attack upon our municipalities was provided by the 1945 Constitution of Missouri, V.A.M.S. *Article VI, §21*"). The constitutional provision provides:

> Laws may be enacted and any city or county operating under a constitutional charter may enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for

recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest.

MO. CONST. ART. VI, §21.

Anti-blighting legislation even preceded the 1945 Constitution, as shown by the Housing Act of 1939, the purpose of which, as this Court noted, "is that areas of congested population shall be free from the menace of slums and from fire hazards, disease, crime and juvenile delinquency which result from slum housing, and which cause 'disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection and other public services and facilities.'" *Bader Realty & Investment Co. v. St. Louis Housing Authority*, 358 Mo. 747, 217 S.W.2d 489, 493 (banc 1949). The pivotal difference between the anti-blighting legislation preceding the adoption of Article VI, Section 21 and those legislative schemes adopted in furtherance of those constitutional grants of authority was in the method used to eliminate blight. The former programs were purely governmental operations while the latter involved public-private partnerships of one form or another that were crafted to bring about the redevelopment of blighted areas. *See, e.g., Council Plaza Redevelopment Corp. v. Duffey*, 439 S.W.2d 526, 528 (Mo. banc 1969)("The obvious objective [of programs premised on Article VI, §21 and Article X, § 7] was to involve private enterprise in the monumental task of eliminating urban blighted areas and

the inevitable social ills flowing therefrom"); *Annbar Associates*, 397 S.W.2d at 639 ("In this state urban renewal and redevelopment is being accomplished, for the most part, through a program of cooperation between government and private enterprise, the government furnishing its power of eminent domain and private enterprise performing the actual redevelopment").

The purpose behind the constitutional authorization for anti-blighting legislation, in general, and the public-private partnership approach to the problem was set out by the Court in *Annbar Associates*:

> It is common knowledge that one of the results of the nineteenth century beginning of the transformation of our country from a predominantly agricultural to a predominantly industrial society has been the growth like a 'Topsy' of our great cities. Within the last thirty years we have awakened to the realization that a result of that growth has been the creation of slums and blighted areas therein constituting a serious and growing menace injurious to the public health, safety, morals and welfare of their inhabitants as well as a depreciation in value of properties within and adjacent to those areas, and a consequent progressive diminution of tax revenues. Prompted by the need to eliminate these conditions as a breeding ground for juvenile delinquency, infant mortality, crime and disease, most, if not all, states have vested their municipalities with power to eradicate those conditions and redevelop those areas.

397 S.W.2d at 639.

What is evident from the history behind the adoption of Article VI, Section 21 of the Constitution, and what should guide the Court in its interpretation of the TIF statute

before it, is that the people intended that anti-blighting legislation be used as a reactive force to deal with existing social ills in the community and not as a pro-active device to spur new development. Because of the coercive power of eminent domain and the shifting of tax burdens through tax incentives (or, as with TIF the "re-direction" of tax revenues from public entities to the developer to pay for reimbursable project costs), that accompany redevelopment programs such as TIF, both the people in their constitutional provision and the legislature through the language it has used in its legislation have sought to constrain the exercise of this power to those circumstances in which social ills from "blighted, substandard or insanitary areas" exist and need redressed and denied the exercise of the power as a means to merely create and incentivize new development.

Thus, the constitutional provision, titled "Reclamation of blighted, substandard or insanitary areas" uses the terms "replanning, reconstruction, redevelopment and rehabilitation" as the activities authorized by it. MO. CONST. ART. VI, §21(emphasis added). In *Maryland Plaza Redevelopment Corp. v. Greenberg*, 594 S.W.2d 284, 288 (Mo. App. 1979), it was "a substantial undesirable mutation in the area" which justified the resort to the use of the urban renewal statute at issue there. This Court also recognized the inherent quality of urban renewal legislation as reactive in *State ex rel. Atkinson v. Planned Industrial Expansion Authority*, 517 S.W.2d 36 (Mo. banc 1975):

> Thus, by definition, an undeveloped area [as contemplated in the Planned Industrial Expansion Law, §§ 100.310, *et seq*.] is considered such because its development has been stunted or has become defective in some way. It is difficult to imagine an 'undeveloped industrial area' as above defined which has not undergone earlier

development of some kind; otherwise how could there be defective and inadequate street layout or location of physical developments, or inadequate subdivision and platting with vacant parcels not used economically, or obsolete plants, or insufficient space for efficient use of land for industrial plants creating economic waste and conditions retarding economic and social growth, as well as inability to pay reasonable taxes? The fact of lack of development in a particular area may itself be caused by surrounding urban decay and blight. We do not agree with relator's contention that 'the law overreaches by including undeveloped industrial areas under the possible areas which may be blighted.' Nor does the fact that land is vacant mean it cannot be considered 'blighted.' It may well be vacant because it no longer meets the economic and social needs of modern city life and progress. As respondent points out, the purpose of the act is to cure urban ills; the definition does not include virgin territory or 'pristine wilderness' which might be put to use, but is limited to land which is unimproved or unused by virtue of one of the developmental defects listed in the defining statute. These areas are certainly subject to 'rehabilitation.'

Id. at 46-47.

The legislature recognized the reactive nature of urban renewal when it defined a "blighted area" for purposes of the TIF Act and also sought to limit its use to those instances in which the powers granted under the act were narrowly constrained to redressing the actual social issues identified. It did this not only with its identification of the specific blighting factors which must exist but also through its requirement that the specific blighting factors must be predominant in the area to be redeveloped. §99.805(1),

RSMo. Consistent with what this Court noted in *Atkinson*, the legislature has determined and intended that minor and isolated instances of blighting factors are not to be used as a pretext for infusing new development into the community. Redevelopment must be narrowly tailored to encompass only that vacant and unblighted property as is necessary to cure the blighting conditions noted and which is, itself unused or underutilized because of those blighting factors.

This Court has not had occasion to deal with this particular concern with use and misuse of the state's urban renewal laws. Courts of other states, however, have identified the evils which occur when urban renewal legislation is not confined as it should be to a pure reaction to existing social ills. In California, the Community Redevelopment Law (a compatriot of Missouri's TIF Act) has been used in a number of different locations around California. Actions similar to those of the City of St. Peters in the current matter have been rejected by California Courts under its Community Redevelopment Law. For example, in *Beach-Courchesne v. City of Diamond Bar*, 95 Cal. Rptr. 2d 265 (Cal. App. 2000), the California Court of Appeals reviewed determinations of a blighted area with respect to a Community Redevelopment Plan. As the Court said there:

> The purpose of CRL [Community Redevelopment Law] is to provide a means of remedying blight where it exists. The CRL is not simply a vehicle for cash-strapped municipalities to finance community improvements. If the showing made in the case were sufficient to the rise to the level of blight, it is the rare locality in California that is not afflicted with that condition.

Id. at 407.

The blight findings in the City of Diamond Bar's resolution are nearly a carbon copy of those found in the City of St. Peters Ordinance and Redevelopment Plan. The fact that an area has a few specific examples of poor growth is not demonstrative that the predominance of the area is blighted. Section 99.805(1) requires that the predominance of the area have the various blighting factors referenced. The actions of the City of St. Peters are unfortunately not that uncommon in and around the State of Missouri and in and around the United States. The same California Court of Appeals in a separate decision, *Leach v. City of San Marcos*, 261 Cal. Rptr. 805 (Cal. App. 1989) addressed the concerns that are present with the St. Peters project:

> Unrestricted use of redevelopment powers fosters speculative competition between municipalities in their attempts to attract private enterprise, speculation which they can finance in part with other people's money. When the extraordinary powers of legislation designed to combat blight and renew decayed urban areas are used as a fiscal device to promote industrial, commercial, and business development in a project area that is merely underdeveloped rather than blighted, competitive speculation may be turned loose.

Id. at 807.

The California Court was quite prescient in its view of where such speculation would go in the future. As St. Peters has done, taking a valuable piece of land that has not yet developed and turning it into a big box development such as a Costco does not reflect blight and does not remedy the social ills intended to be redressed by the Tax Increment Financing Act. The California Court in *Leach* summed it up appropriately:

> By misemploying the extraordinary powers of urban renewal a redevelopment agency captures pending tax revenues which they can then use as a grubstake to subsidize commercial development within the project area with the hope of striking it rich. Such schemes contemplate borrowing money by issuing bonds on the strength of assured future tax revenues, money which is then used to acquire, improve, and resell property within the project area at a loss as an inducement to business enterprises such as K-Mart to locate within the project area rather than in the neighboring communities. In essence, tax revenues are used as subsidies to attract new business. The immediate gainers are the subsidized businesses. The immediate losers are the taxpayers and the government entities outside the project area, who are required to pay the normal running expenses of government operation without the assistance of new tax revenues from the project area.

Id. at 807-808 quoting *Regus v. City of Baldwin Park*, 139 Cal. Rptr. 196 (1977).

The California Court of Appeals was quite accurate in its predictions of what would happen if blighting factors and redevelopment projects were not carefully scrutinized and limited. The fire sale of city, school district and other local taxing district resources to private developers has continued at an ever greater pace in Missouri and St. Peters' actions in the current matter clearly demonstrate what the California Court was concerned about.

B.

A Strict Enforcement of the "Preponderance" Requirement Is Consistent With the National Trend to Rein In the Use of Urban Renewal Powers

Nationally the trend is against the continued expansion of the use of government funds and government powers for the pure benefit of private developers. Due to the increasing abuses of urban renewal legislation by municipalities where local governments mortgage the farm (or in many cases condemn the farm) for the benefit of Wal-Mart, Home Depot and other big-box retailers; courts around the country have begun limiting the use of these powers to their intended purpose and have resisted allowing these programs to expand beyond urban renewal. While most of the cases have sought to do so through legal doctrines enforcing prohibitions on the loan or grant of funds to private entities, they reflect the concern with misuse of urban renewal powers. This Court also has the opportunity here to bring the resort to urban renewal legislation within its appropriate bounds by insisting that this type of legislation be defined and applied within the narrow context for which it was created. This Court should review the actions of St. Peters and legal issues inherent in the TIF Act, and follow this national trend to protect private property and taxpayer dollars from all-out bidding wars for Wal-Marts, or as in the current matter, Costco.

The Michigan Supreme Court reviewed the attempt by Wayne County, to condemn property and use taxpayer dollars to create a business and technology park. *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). The Court overruled longstanding precedent to hold that the use of eminent domain for land acquisition for a

private developer violated the Michigan constitution. *Id.* at 784, expressly overruling *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981). The decision in *Poletown* had changed years of jurisprudence which had prohibited the use of governmental powers and public funds for a private entity. The Michigan Supreme Court acknowledged that the trend had gone too far and that excesses had to be reeled in. *County of Wayne*, 684 N.W.2d at 786-787. As stated there:

> Every business, every productive unit in society, does, as Justice COOLEY noted, contribute in some way to the commonwealth. [FN89] To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown's* "economic benefit" rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like. (Footnote omitted).

Id. at 786. While the Court in *County of Wayne* dealt with eminent domain issues, the logic and law certainly are applicable to the current matter and Missouri's TIF Act in how the statute should be interpreted.

The Supreme Court of South Carolina similarly held that governmental powers and taxpayer dollars could not be used for the development of a maritime terminal to be

leased on a long-term basis to a private developer. *Georgia Department of Transportation v. Jasper County*, 586 S.E.2d 853 (S.C. 2003). In *Jasper County*, the South Carolina Supreme Court found that there was no public use in creating a maritime terminal where a private lessor would do all the development work and would manage and operate the terminal and receive profits from the operations. *Id.* at 639.

> The private lessor, SAIT, will finance, design, develop, manage, and operate the marine terminal. The terminal itself will be a gated facility with no general right of public access; access is limited to those doing business with SAIT. SAIT will have agreements with various steamship lines and will charge them per container fees for unloading, storing, and delivering. The marine terminal is considered a "public" terminal simply because it will serve different steamship lines as opposed to a single line or cargo interest.
>
> We hold the trial court erred in finding the property will be taken for public use and conclude the condemnation is therefore unlawful.

Id. at 857. The Costco prospect in St. Peters is no different and the abuse mandates limits be placed on TIF plans.

The Illinois Supreme Court has similarly found that the use of eminent domain by a regional development authority to develop a parking lot for a racetrack exceeds constitutional powers of local government. *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 768 N.E.2d 1 (Ill. 2002). The Court found that the racetrack was a private venture "designed to result not in a public use, but in private

profits." *Id.* at 9. Accordingly, the Court found that the use of governmental powers and funds for a non-public use was inappropriate. *Id.* at 10.

Other states have recently followed this trend. See e.g., *Township of West Orange v. 769 Associates, LLC*, 775 A.2d 657 (N.J. App. 2001) (development of a road for private of developer's benefit); and *City of Midwest City v. House of Realty, Inc*., 2004 WL 1446925 Okla. 2004) (no inherent eminent domain power to create economic redevelopment).

The protection of private property and taxpayer funds must be reinforced by this Court. Guidelines should be established as to what extent public funds and services may be granted to private entities. Under the TIF Act these questions come to the forefront and should be addressed by this Court at this opportunity. National trends demonstrate that the auctioning of cities' eminent domain powers and tax funds to the highest bidding private developers must be curtailed. Similarly, this Court should put a brake on the dramatic and unlawful expansion of the TIF system and its obvious excesses.

The California Court of Appeals in *Leach v. City of St. Marcos, supra*, also emphasized the concerns about the use of tax revenues as subsidies to attract new businesses, such as K-Mart. *Id.* at 807. While the current matter deals with Costco, it could just as easily be a K-Mart or a Wal-Mart that was the beneficiary of the use of the TIF statute in the current matter.

> When the extraordinary powers of legislation designed to combat blight and renew decayed urban areas are used as a fiscal device to promote industrial, commercial, and business development in a project area that is merely underdeveloped rather than

> blighted, competitive speculation may be turned loose. By misemploying the extraordinary powers of urban renewal a redevelopment agency captures pending tax revenues which it can then use as a grubstake to subsidize commercial development within the project area in the hope of striking it rich. Such schemes contemplate borrowing money by issuing bonds on the strength of assured future tax revenues, money which is then used to acquire, improve, and resell property within the project area at a loss as an inducement to business enterprises such as K-Mart to locate within the project area rather than in neighboring communities. In essence, tax revenues are used as subsidies to attract new business.

Id.

This use of TIF statutes to create corporate give-a-ways for retail businesses reflects a clear derogation of the intent of the General Assembly in enacting the Tax Increment Financing Act.

The City of St. Peters appears to have taken the tact that simply if a project has any benefit to the City, even the minor benefit of additional tax dollars coming in, that Tax Increment Financing is the appropriate vehicle to achieve that. The Supreme Court of the State of Nebraska has rejected a similar argument in *Fitzke v. City of Hastings*, 582 N.W.2d 301 (Ne. 1998), the Court there stated:

> While construction and operation of the campground may have been a desirable economic development for Hastings [the City], this factor alone does not justify incorporating the campground site into an existing redevelopment area to permit the use of tax increment financing as an incentive to the developer.

Id. at 312. The Nebraska Court recognized that to continually allow any economic development to qualify for Tax Increment Financing was not the intent of Nebraska's Community Development Laws. Similarly, the California Court of Appeals in *Beach-Courchesne v. City of Diamond Bar, supra*, stated:

> It never can be used just because the public agency considers that it can make a better use or planning of an area than its present use or plan. (*Sweetwater Valley Civic Assn. v. City of National City* (1976) 28 Cal.3d 1270, 278, 133 Cal.Rptr. 859, 555 P.2d 1099.) Thus, the concededly desirable goal of improving an area is "insufficient by itself to justify use of the extraordinary powers of community redevelopment. If it were, tax increment financing at public expense would become commonplace as a subsidy to private enterprise." (*Regus v. City of Baldwin Park* (1977) 70 Cal.App.3d 968, 979, 139 Cal.Rptr. 196.)

Id. at 270.

Most recently the United States Supreme Court accepted certiorari on a case arising out of the Supreme Court of Connecticut dealing with the use of governmental powers, specifically eminent domain, to benefit a private developer in the City of New London, Connecticut. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) (certiorari accepted September 28, 2004). In *Kelo*, the City of New London was seeking to use the power of eminent domain to condemn homes for the purpose of building new office buildings and retail businesses. Ultimately, the Supreme Court of Connecticut, in a 4 to 3 decision, authorized the use of eminent domain for this purpose over a strenuous dissent. The United States Supreme Court accepted certiorari to specifically address the

issue of the use of governmental powers, and eminent domain, to benefit a private entity. Clearly, even the United States Supreme Court recognizes that the Wal-Mart's and Costco's of the world are sufficiently profitable without needing government incentives to grow.

Ultimately, the provisions of Section 99.805, et seq. (the Tax Increment Financing Act) have been so distorted and misconstrued by the City of St. Peters and other entities around the state, that this Court must act to rein in the patent abuses occurring all across Missouri. While the elimination of urban blight is a worthy cause, it is not appropriate for cities to use Tax Increment Financing on valuable property simply to generate more tax revenue.[5] It is for this reason that the egregious abuses of the Tax Increment Financing Act must be curtailed by this Court. This case offers the Court the opportunity to set reasonable and rational guideposts for the creation of redevelopment areas and for the elimination of urban blight where such blight truly exists yet to keep corporate give-a-ways at a bare minimum, especially in fast growing areas which would see development without TIF.

[5] In this case, much of that tax revenue going for the operation of a multi-purpose center, a purpose wholly unrelated to the development of the Tax Increment Financing Redevelopment Area.

CONCLUSION

The nature of the City of St. Peters' findings with respect to a preponderance of blighting factors in the redevelopment area is simply arbitrary and capricious and cannot stand scrutiny by this, or any other, court. To allow the findings to stand would simply defer to the Board of Aldermen's legislative powers where there is no factual support whatsoever for their determinations. The preponderance of blighting factors in the redevelopment area is not reasonably debatable and, thus, cannot stand. This Court should reverse the trial court's decision and, in doing so, should mandate that the City of St. Peters and all other entities originating tax increment financing ensure that use of the powers granted under the statute are used solely to cure the social ills of blight and not as a program for give-a-ways of tax dollars to meet increasing competition between cities for new development.

On a broader note, the general actions by the City of St. Peters indicate a disturbing trend under Missouri's Tax Increment Financing scheme. Give-a-ways for Wal-Mart's and Costco's are handed out like candy on Halloween. Cities bid against each other in the hopes that their package of dollars will be larger than the neighboring city's package of dollars, all to the detriment of taxpayers and to other taxing entities, such as counties and school districts, which see no growth in their revenue base due to the Tax Increment Financing. This Court should be consistent with the trend of the courts of other states and put reasonable limitation on the use of Tax Increment Financing and the handout of government dollars and services to private developers.

This Court should reverse the trial court's decision and give guidance as to what extent a proper Tax Increment Financing plan and project maybe created under the Missouri Constitution and the statutes.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Reply Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 6,925 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 ½" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief of Amicus Curiae Great Rivers Habitat Alliance and a copy in electronic format on a 3 ½" disk were sent U.S. Mail, postage prepaid, to the following parties of record on this 15th day of November, 2004:

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